

1 1989, identifying her impairments as vasculitis, rheumatoid arthritis, incisional hernia,
2 depression, asthma, and anxiety. (Tr. 91.) The Social Security Administration denied
3 Plaintiff's application initially (Tr. 29, 31-31) and upon reconsideration (Tr. 30, 37-39).
4 A hearing was held before Administrative Law Judge ("ALJ") Marguerite
5 Schellentrager on September 8, 2004. Plaintiff, who was represented by counsel,
6 testified at the hearing. (Tr 487-519.) Dr. Wil Nelp, a medical expert ("ME"), also
7 testified at the hearing. (Tr. 519-534.) The ALJ issued an unfavorable decision on
8 December 4, 2004, finding that Plaintiff's impairments do not prevent her from
9 performing her past relevant work, and thus, she is not under a disability as defined in
10 the Social Security Act. (Tr. 27.) On January 28, 2006, the Appeals Council denied
11 Plaintiff's request for review, making the ALJ's decision the final decision of the
12 Commissioner. (Tr. 6-9.) Plaintiff timely filed her appeal with this Court.

13 II. BACKGROUND

14 Plaintiff was 47 years old at the time of the hearing before the ALJ. (Tr. 487.)
15 She has a GED education (Tr. 97), and she report her prior work as pizza delivery,
16 cashier/clerk, and bank proof operator (Tr. 92). Plaintiff also has a history of substance
17 abuse.

18 III. THE ALJ'S DECISION

19 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful
20 activity during the time relevant to this matter. (Tr. 20, 27.) The ALJ identified
21 Plaintiff's severe impairments as connective tissue disorder with vasculitis, and
22 substance abuse. (*Id.*) However, the ALJ determined, at step three, that these
23 impairments do not meet or equal the criterial of any listing. (*Id.*) The ALJ found that
24 Plaintiff has retained the residual functional capacity to perform sedentary work. (Tr.

26, 27.) In making this determination, the ALJ found that Plaintiff's statements concerning her impairments and the nature and extent of her limitations are not entirely credible in light of information contained in the medical reports and other evidence in the record. (Tr. 21, 27.) At step 4, the ALJ found that Plaintiff's impairments do not prevent her from performing her past relevant work as a bank 10-key proof operator. (Tr. 27.) Accordingly, the ALJ concluded that Plaintiff is not under a disability as defined in the Social Security Act. (*Id.*)

IV. STANDARD OF REVIEW

The court may set aside the Commissioner's denial of social security disability benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

V. DISCUSSION

Plaintiff argues that the ALJ erred by: 1) finding that Plaintiff had past relevant work as a bank proof operator; 2) failing to apply the two-stage method for evaluating substance use set forth in *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001); 3) failing to follow the mandatory method for evaluating a mental impairment pursuant to

1 20 C.F.R. § 416.920a; and 4) failing to give clear and convincing reasons for rejecting
2 treating rheumatologist Dr. Pollock's opinions. The Commissioner concedes the
3 judgment to Plaintiff, arguing that the only issue is whether this Court should remand
4 for further administrative proceedings or for a finding of disability.

5 This Court initially notes that contrary to the Commissioner's assertion that
6 Plaintiff seeks reversal and remand for a finding of disability (*see* Dkt. 21 at 7), Plaintiff
7 makes no such argument in either her opening or reply briefs. Rather, both parties
8 agree that the Commissioner's decision must be reversed and remanded for further
9 administrative proceedings pursuant to 42 U.S.C. § 405(g). (Dkt. #15 at 14; Dkt. #21 at
10 12.) Specifically, both parties appear to agree that: 1) the ALJ's step four finding was
11 not correct; 2) the ALJ's disability determination incorrectly analyzed Plaintiff's
12 substance abuse; 3) the ALJ should reevaluate the opinion of Plaintiff's treating
13 rheumatologist, Dr. Scott Pollock; and 4) the ALJ should reevaluate lay witness
14 statements.

15 The Commissioner further urges that, on remand, the ALJ should reconsider all
16 medical source opinion evidence and obtain supplemental testimony from a medical
17 expert; reassess Plaintiff's residual functional capacity; and re-evaluate the step four
18 and five determination with the benefit of vocational expert testimony. (Dkt. #21 at 6-
19 7, 12). Plaintiff does not object to such additional considerations by the ALJ on
20 remand. However, she argues that since the Commissioner failed to address her
21 arguments regarding use of the *Bustamante* method for evaluating substance abuse and
22 the ALJ's failure to adhere to 20 C.F.R. § 416.920a in evaluating her mental
23 impairments, this Court should order that the ALJ respect and follow *Bustamante* and
24 the regulation on remand. Plaintiff also argues that this court should hold either that
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1 she did not have past relevant work as a bank proof operator or, at a minimum, require
2 the ALJ to expressly reconcile any finding that Plaintiff had past relevant work as a
3 bank proof operator with her official earnings record.

4 This Court concurs that the two-stage *Bustamante* method and § 416.920a should
5 be followed on remand. In *Bustamante*, the Ninth Circuit held that it is error for an ALJ
6 to determine that a claimant's mental impairments are "the product and consequence of
7 his alcohol abuse" prior to making a determination that the claimant is disabled under
8 the five-step inquiry. *See Id.*, 262 F.3d at 954-55. Likewise, the regulation in question,
9 which addresses the evaluation of mental impairments, expressly provides:

10 [W]hen we evaluate the severity of mental impairments for adults . . . we
11 *must follow a special technique at each level in the administrative review*
12 *process.* We describe this special technique in paragraphs (b) through (e)
13 of this section.

14 20 C.F.R. §416.920a (emphasis added).

15 This Court also agrees that Plaintiff's official earning statement supports her
16 claim that she did not have past relevant work as a bank proof operator in 1989, as it
17 shows that Plaintiff had no earnings in 1989. (Tr. 88-89). However, as the
18 Commissioner correctly notes, Social Security Regulation 86-62 provides in pertinent
19 part:

20 While the regulations provide that a claimant/beneficiary's work
21 experience is usually relevant when the work "was done within the last 15
22 years," in some cases, work performed prior to the 15-year period may be
23 considered as relevant when a continuity of skills, knowledge, and
24 processes can be established between such work and the individual's
25 more recent occupations.

26 SSR 82-62, 1982 WL 31386, at *2 (S.S.A). Thus, this Court concludes that on remand,
if the ALJ finds that Plaintiff has past relevant work as a bank proof operation, which
was undisputably performed prior to the required 15-year period under 20 C.F.R.

1 416.965(a), the ALJ should expressly reconcile that finding with SSR 82-62.

2 Accordingly, upon remand, the ALJ is directed to: (1) reevaluate medical source
3 opinion evidence, including but not limited to the opinions of treating rheumatologist
4 Dr. Pollock; (2) consistent with 20 C.F.R. § 416.920a, evaluate Plaintiff's medically
5 determinable mental impairments; (3) reevaluate Plaintiff's substance abuse using the
6 two-stage *Bustamante* method; (4) reevaluate any lay witness statements; (5) reassess
7 Plaintiff's residual functional capacity; (6) reevaluate the step four and step five
8 determination with the benefit of vocational expert testimony; (7) expressly reconcile
9 any finding that Plaintiff has past relevant work as a bank proof operator with SSR 82-
10 62; (8) otherwise weigh all the evidence, including any new evidence submitted by
11 Plaintiff or obtained by the ALJ, hold a new administrative hearing, and render a new
12 decision.

13 VI. CONCLUSION

14 The Commissioner's determination to deny Plaintiff SSI benefits contains legal
15 errors and is not supported by substantial evidence. Based on the record evidence, the
16 undersigned recommends that the Commissioner's decision be REVERSED and
17 REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative
18 proceedings, including the steps set forth above. A proposed Order accompanies this
19 Report and Recommendation.

20 DATED this 1st day of February, 2007.

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22 MONICA J. BENTON
23 United States Magistrate Judge
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